88-1350

Supreme Court, U.S.
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No.

# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

**FREDERICK SMITH**, in his individual and official capacity as Principal Bradford Area High School; **RICHARD MILLER**, in his individual and official capacity as assistant principal of the Bradford High School; and **FREDERICK SHUEY**, in his individual and official capacity as Superintendent of the Bradford Area School District

*Petitioners*

**vs**

**JUDY GROVE SOWERS**

*Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

## PETITION FOR WRIT OF CERTIORARI

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## I. QUESTIONS PRESENTED

A. Whether the due process clause of the Fourteenth Amendment places on school districts or its administrators a constitutional duty to protect students from a criminal assault by a teacher, committed during summer vacation when the student was voluntarily present in the teacher's home, where the district has no knowledge of the criminal activity or the fact that any particular individual is at risk. The Court below answered in the *affirmative.*

B. Whether any such duty was clearly established as a matter of law in 1979 when the Petitioners acted in this case. The Court below answered in the *affirmative.*

C. Whether the imposition of this duty places school districts and their administrators in the position of guarantors of a student's safety, even when the student is not attending school or a school sanctioned activity. The Court below did not address this question.

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## IV. OPINIONS BELOW

The Opinion and Order of the United States Court of Appeals for the Third Circuit is printed in the Appendix hereto, page 1. The Opinion and Order of the United States District Court for the Western District of Pennsylvania is reported at 694 F.Supp. 1088 (1988) and 1988 U.S. Dist. LEXIS 9613, and is printed in the Appendix hereto, pp. 9-46.

## V. STATEMENT OF JURISDICTION

Jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254.

The Opinion and Order of the United States Court of Appeals for the Third Circuit was entered on January 31, 1989. App., page 1.

Jurisdiction for the appeal to the United States Court of Appeals for the Third Circuit was based upon 28 U.S.C. § 1291. The appeal to the United States Court of Appeals for the Third Circuit was made in accord with *Mitchell vs Forsyth*, 472 U.S. 511 (1985), which holds that a denial of a claim of qualified immunity is an appealable final order within the meaning of 28 U.S.C. § 1291.

Jurisdiction of the United States District Court for the Western District of Pennsylvania was invoked by Plaintiff based upon 28 U.S.C. § 1983.

## VI. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following are the constitutional provisions and statutes involved in this appeal:

A. Constitutional Provisions

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States under the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Amendment 14, Section 1.

B. Federal Statutes

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the

party injured in an action at law, suit and equity, or other proper proceeding for regress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983

C. State Statutes

Every teacher, vice principal and principal in the public schools shall have the right to exercise the same authority as to conduct and behavior over the pupils attending his school, during the time they are in attendance, including the time required in going to and from their homes, as the parents, guardians or persons in parental relation to such pupils may exercise over them.

24 Pa.C.S.A. § 13-1317.

## VII. STATEMENT OF CASE

This is an appeal of an Order of the United States Court of Appeals for the Third Circuit, Case No. 88-3640, affirming the Order of the United States District Court for the Western District of Pennsylvania, Case No. 88-57 Erie, which denied the Motion of Petitioners Frederick Smith, Richard Miller and Frederick Shuey to Dismiss on the grounds that they are immune from suit on the allegations of this case. This action commenced with the filing of a Complaint by Plaintiff-Respondent, Judy Grove Sowers ("Respondent" or "Sowers"), in the United States District Court for the Western District of Pennsylvania, Erie Division, on February 17, 1988. Complaint, App., p. 45.

The facts material to the consideration of the questions presented are as follows. The Bradford Area School District (the "School District"), which is not a party to this appeal, is a local governmental agency organized pursuant to the laws of the Commonwealth of Pennsylvania. During the relevant period of time, Petitioner, Frederick Smith ("Smith"), was the principal of the Bradford Area High School; Petitioner Richard Miller ("Miller"), was the assistant principal; and Petitioner Frederick Shuey ("Shuey"), was the superintendent of the School District.

Respondent Judy Grove Sowers ("Sowers") attended the Bradford Area High School, graduating in 1980.

The record before the District Court and the Court and the Court below reveals the following:

Sowers contends in her Complaint that in June of 1979 the former band director of the Bradford Area High School, Edward Wright, sexually assaulted her. Complaint, par. 12, App., p. 51. Although she omits these material facts from her Complaint, she has testified in a deposition taken in a related case that, during her summer school vacation and after becoming intoxicated at her sister's wedding reception, she visited Wright's private home, where this assault allegedly occurred. App., pp. 69 *et seq.*.[1] This is the only incident of sexual assault of which Sowers complains. No incident occurred while Sowers attended school or a school sponsored activity.

On April 12, 1988, Petitioners filed a Motion To Dismiss, contending *inter alia* that:

> 1.) Respondent's claims were barred by the applicable statute of limitations;
>
> 2.) The School District had no constitutional duty to protect her for this incident, which happened during summer vacation when she was voluntarily present in the teacher's home;

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[1] This deposition was originally a part of the record in the related case of *Stoneking v. Bradford Area School District, et al.*, 856 F.2d 594 (3d Cir. 1988), *petition for certiorari pending* at No. 88-802 in this Court. It was also submitted to and considered by the District Court in this case, which referred to the deposition in its recitation of facts. District Court Opinion, App. at 12. Smith, Miller and Shuey have reproduced the relevant pages of this deposition in the interest of judicial economy since, although Sowers' own Complaint does not recite these facts, her counsel have not attempted to deny this sworn testimony in the prior cases.

3.) Respondent alleged no actionable violation of her civil rights; and

4.) Petitioners Smith, Miller, and Shuey were shielded from liability by the defense of qualified immunity.

The District Court issued its Opinion and Order on August 29, 1988. The District Court held, *inter alia*, that there were genuine issues of material fact pertaining to the statute of limitations; that Respondent had alleged a violation of a right protected by the substantive component of the due process clause; and that Petitioners Smith, Miller, and Shuey were not shielded from liability by the defense of qualified immunity.

Petitioners filed their Notice of Appeal on September 26, 1988, from the District Court's Order as it relates to the issue of qualified immunity.[2]

The United States Court of Appeals for the Third Circuit issued its judgment order, without an opinion, denying Petitioners appeal on January 31, 1989. Judgment Order, App., p. 1. The Court found that the disposition of this case was "essentially controll[ed]" by the decision of a divided panel of the Court in the case of *Stoneking v. Bradford Area School District, et al.*, 856 F.2d 594 (3d Cir. 1988), *petition for certiorari pending* at No. 88-802 in this Court.

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[2] A denial of a claim of qualified immunity is an appealable final order within the meaning of 28 U.S.C. § 1291. *Mitchell vs Forsyth, supra.*, 472 U.S. 511.

## VIII. ARGUMENT

### *A. Summary of argument*

The Third Circuit's ruling in this case marks an additional expansion of civil liability under § 1983, extending liability even further than in its erroneous decision in *Stoneking v. Bradford Area School District, et al.*, 856 F.2d 594 (3d Cir. 1988), *petition for certiorari pending* at No. 88-802 in this Court. By affirming the judgment of the District Court, the Third Circuit, in this case, goes far beyond previous law, contradicting not only its own prior rulings but those of this and other Courts as well. On the facts of this case, the Court's ruling has the practical effect of making school districts, under the guise of § 1983, virtual insurers of the safety of students whenever and wherever they may come in contact with a school employee.

It must be remembered that the Courts below were faced only with the narrow issue of whether these school officials were entitled to qualified immunity for actions they took (or allegedly failed to take) in 1979. As discussed in more detail below, governmental officials can be found liable only when they knew or should have known that their conduct violated some "clearly established" constitutional rights of the plaintiff.

Before the District Court could determine whether the alleged right was "clearly established," however, it first had to determine whether such a right exists at all. The

District Court found that a school district does have an affirmative duty, arising out of the Fourteenth Amendment, to protect a high school student on summer vacation from sexual abuse by a teacher which occurs while the student is voluntarily in the teacher's home. The Court then found that this newly-created duty was "clearly established" in 1979 when these officials acted.

This holding, however, must be carefully scrutinized in light of the fact that the District Court relied heavily upon the opinion of the Third Circuit in the case of *Estate of Bailey by Oare vs County of York*, 768 F.2d 503 (3rd Cir. 1985). That opinion is directly contrary to a decision on identical facts by the Seventh Circuit, a decision now under review by this Court. *DeShaney vs Winnebago County*, 812 F.2d 298 (7th Cir. 1987), *cert. granted* 108 S. Ct. 1218 (1988). Moreover, the District Court's finding of potential liability in this case seems to be directly contrary to this Court's rationale in *Martinez vs California*, 444 U.S. 277 (1980).

Petitioners thus contend that, by affirming the District Court without an opinion, the Circuit Court erred in (a) finding that such a constitutional duty exists in the first instance, and (b) further erred in holding that such a duty was "clearly established" at the time Respondents acted. These errors are so egregious that this Court ought to grant certiorari and examine for itself the far-reaching implications of the holding of the Court below.

The finding of the District Court that a duty exists, guaranteed by the due process clause, to protect persons

at liberty from harm, is an essential part of its more narrow ruling on the sole issue before it (that of qualified immunity). The broad implications of this ruling thus require review by this Court.

### *B.* Stoneking *does not control the outcome of this case*

The Third Circuit, in its Judgment Order in this case, found that its prior opinion in *Stoneking v. Bradford Area School District et al., supra,* was "essentially controlling" in this case, and accordingly affirmed the District Court without opinion. The Third Circuit, however, failed to recognize the many material and dispositive distinctions between *Stoneking* and this case.

There is an old saw, frequently recalled by lawyers, that "hard cases make bad law." If that is true, this corollary is also true: bad law begets worse law. This case is an example of that corollary.

While Petitioners do not concede that *Stoneking* is a "hard case," it is somewhat more troublesome than the case at bar in that it involves a female student allegedly abused over a long period of time by a teacher, on and off of school property, on band trips and on other occasions. But regardless of whether *Stoneking* is a "hard case," the Third Circuit's decision in that case is certainly "bad law" and ought to be reversed, for the reasons set forth in the petition for certiorari in that case now pending in this Court.

The Third Circuit's finding that *Stoneking* "essential-

ly" controls this case has the effect of extending that "bad law" to create potential liability to a much wider range of persons. Unlike *Stoneking*, in this case there is only one alleged contact between Sowers and Wright. This single incident occurred off of school property, during summer vacation when the school officials had no ability to supervise either the teacher or the student. There is furthermore no evidence that the school district had notice of any sort prior to the alleged incident that Wright was a threat to any person. In short, there is simply nothing the school district or its officials could have done to prevent this alleged assault.

The effect of this ruling is that, in the Third Circuit, school officials are now held to a constitutional duty to protect students in situations (*i.e.*, during summer vacation in a private home) where they have no ability to fulfill that duty. This vast expansion of liability is completely contrary to the limited remedial purposes of § 1983, *see Paul v. Davis*, 424 U.S. 693 , at 700-701 (1976), and requires scrutiny and reversal by this Court.

***C. Public school officials have no constitutional duty to protect a student from the criminal acts of a teacher, when the student is not in their custody or subject to their control.***

It must be noted at the outset that Sowers is not claiming that Smith, Miller and Shuey actually abused her or touched her in any way. Sowers asserts only that she has a right to be free from sexual molestation, and that Smith, Miller and Shuey had a duty to protect her from

this alleged molestation, despite the fact that she was not in the custody or control of these administrators at the time of the incident of which she complains.[3]

The issue of whether governmental officials have a constitutional duty to protect individuals at liberty from criminal acts of third persons is presently before this Court. In *DeShaney vs Winnebago County*, 812 F.2d 298 (7th Cir. 1987), *cert. granted* 108 S. Ct. 1218 (1988), *pending at* No. 87-154,[4] this Honorable Court has been asked to determine whether a child enjoys a constitutionally-protected right under the Fourteenth Amendment to protection from abusive parents.

The question of the state's duty to protect individuals at liberty from criminal acts of third persons has been a subject of controversy in the Courts of Appeals since this Court's decision in *Martinez vs California*, 444 U.S. 277 (1980). In *Martinez*, a mentally disturbed sex offender was paroled after five years of a one to twenty year term. It was conceded that the parolee was a known risk when he was released. Subsequent to his release he killed a fifteen year old girl. An action was brought under § 1983

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[3] The gravamen of Sowers' Complaint is that she had a right to be free from sexual assault by a teacher of the Bradford Area School District. Of course, for every right there exists a correlative duty; thus, Sowers alleges in essence that the District and Smith, Miller and Shuey had a duty to prevent the alleged assault against her by Wright, even though the assault occured during vacation in Wright's private home.

[4] Argument was conducted before this Court in *DeShaney* on November 2, 1988.

to recover for the loss sustained as a result of the girl's murder. This Court held that the actions of the parolee were too remote to be considered a proximate cause of the parole board's actions in releasing the parolee, and therefore denied plaintiff's cause of action under § 1983. This Court left open, however, the possibility that liability may be found in future cases. *Id.*, 444 U.S. at 285.

Since *Martinez*, the Courts of Appeals have struggled to define the circumstances under which an affirmative duty to protect will be imposed upon government officials. Some Courts have imposed such a duty when they find that a "special relationship" exists between the state and the individual seeking protection.

For example, in *Jensen vs Conrad*, 747 F.2d 185, (4th Cir. 1984), *cert. denied* 470 U.S. 1052 (1984) the estates of six children who died as the result of brutal beatings inflicted by their guardians sued the children's services agencies which had handled their cases. In each case the child involved had been the subject of an investigation by social workers charged under state law with the obligation to investigate cases of child abuse and take steps necessary to prevent similar abuse from occurring. Causes of action were alleged under § 1983 based upon a purported violation of the children's Fourteenth Amendment rights resulting from the failure of the social service agencies and employees to intervene and provide the protection necessary to prevent the harm which occurred.

The United State Court of Appeals for the Fourth Circuit reviewed the case law which had developed nation-

wide on the issue of an affirmative duty arising out of a special relationship to provide protection against deprivation of constitutional rights. The Court identified three factors which it concluded had been persuasive in finding special relationships in the cases reviewed. These include (1) whether the victim or the perpetrator was in legal custody at the time of or prior to the incident; (2) whether the state had expressly stated its desire to provide affirmative protection to a particular class or specific individuals; and (3) whether the state knew of the victim's particular plight. *Id.*, 747 F.2d at 194-195, n. 11.

Some courts have declined to follow the "special relationship" test, analyzing such cases instead strictly in terms of causation, as this Court did in *Martinez*. For example, the Seventh Circuit has eschewed the notion of a "special relationship" outside of pure custodial relationships such as a prison setting. In *DeShaney, supra* the Seventh Circuit held that a county children's services agency was not liable for serious injuries suffered by a child at the hands of his abusive father even though the agency had received a prior allegation that the child was being abused. That Court held that, while the actions of the county arguably did not help the abused child, they certainly did not harm him or cause his injuries to be more likely to occur, and therefore as a matter of law the county was not liable.[5]

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[5] The Seventh Circuit found that the agency was not liable to the plaintiff, because it was not the cause of the harm. The Court stated

The United States Court of Appeals for the Third Circuit, contrary to the Seventh Circuit, has fully embraced the "special relationship" test outlined by the Fourth Circuit in *Jensen*. In *Estate of Bailey by Oare vs County of York*, 768 F.2d 503 (3rd Cir. 1985), discussing *Jensen*, a divided panel of the Third Circuit suggested that it would be appropriate to find a "special relationship" if the Jensen three-prong test was met. *Estate of Bailey*, 768 F.2d at 509.[6] The Court went on to hold that a county children's services agency could be held accountable under § 1983 for injuries sustained by a minor child at the hand of an abusive parent.

The opinion of the Third Circuit in this case extends the boundaries of this "special relationship" concept even farther. As discussed in more detail at pp. 16-19 below,

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> It is unlikely that [the social worker's] well intentioned but ineffectual intervention did [the infant victim] any good at all, but it is unlikely that she did him any harm. She merely failed to protect him from his bestial father.

*DeShaney*, *Id.*, p.302. The Court in *DeShaney* refused to adopt the special relationship doctrine as set forth in the Third Circuit's decision of *Estate of Bailey*, *supra*.

[6] The United States Court of Appeals for the Third Circuit recently reaffirmed its approval of the *Jensen* three-step analysis. In *Commonwealth Bank and Trust Co. vs Russell*, 825 F.2d 12 (3rd Cir. 1987), the Third Circuit applied the *Jensen* test without expressly saying so. On page 16, the Third Circuit distinguishes *Commonwealth Bank* from *Estate of Bailey*, *supra*, on the basis that *Commonwealth Bank* case flunks the third prong of the three *Jensen* tests (i.e., whether the state knew of any particular threat to plaintiff's decedents).

the Court below has virtually abolished two of the prongs of the three-part test announced in *Jensen, supra.*

It should be pointed out that the operative facts of *Estate of Bailey* are identical to those of *DeShaney*. Should this Court affirm the Seventh Circuit in *DeShaney*, it will almost of necessity overrule the Third Circuit's holding in *Estate of Bailey*. Since both the District Court and the Third Circuit relied heavily on *Estate of Bailey* in their holdings in this case, an affirmance in *DeShaney* will almost certainly necessitate a reversal in this case.

### *D. The Third Circuit order expands liability under § 1983 by abolishing the specific notice requirement of the prior "special relationship" test*

By affirming the District Court's finding of a "special relationship" in this case, the Third Circuit further expanded liability under § 1983. No other Circuit Court has found that a special relationship can exist unless the public body has prior knowledge of the identity of the victim and the victim's particular plight. This requirement is taken directly from this Court's holding in *Martinez, supra.*[7]

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[7] In *Martinez*, this Court held that the § 1983 claimants failed to state a cause of action against the California parole board, because "the parole board was not aware that appellants' decedent, as distinguished from the public at large, faced any special danger." *Martinez, supra.*, 444 U.S. 277 at 286. The circumstances of the incident of which Sowers complains cannot lead to a conclusion other than that Sowers was, in fact, a member of the public at large at the time of the incident.

In its Opinion, the District Court moved well beyond that requirement by finding that public school officials have a constitutional duty to protect a student from the criminal acts of a teacher, committed during summer vacation and on private property, even when there is no notice that a particular, identified student is in peril.

It is uncontroverted that Petitioners had no knowledge of Sowers's particular plight. However, the Third Circuit Opinion would ignore this well accepted requirement, and would deny immunity to defendants. The District Court, in fact, found that the "special relationship" test can be satisfied by a showing that an "identifiable group," rather than a particular individual, is at risk. District Court Opinion, App., p. 22. Thus, instead of accepting as a threshold requirement that public school officials must have particular knowledge of an identifiable student and that student's particular plight, the District Court would establish a duty to protect a broad class of unidentified persons. Petitioners submit that this holding is a significant and unwarranted expansion of liability under 42 U.S.C. § 1983.

More significantly, however, this holding conflicts with this Court's holding in *Martinez, supra.*. Respondent, who was not in any sense of the word in the "custody" of the school district at the time of the alleged assault, falls within the category of "public at large" to whom no special duty is owed under the holding of *Martinez*. 444 U.S. at 286. At the time of the alleged incident, Sowers was not attending school or even a school sponsored activity.

Thus, neither the school district or its administrators selected her out of the public at large and placed her at risk. *See Fox vs Custis*, 712 F.2d 84 (4th Cir. 1983); *Bowers vs DeVito*, 686 F.2d 616 (7th Cir. 1982).

***E. The Third Circuit order also abolishes the "custody" requirement of the prior "special relationship" test***

This Court and the Circuit Courts have imposed an affirmative duty upon government officials to protect individuals only in very limited circumstances. Generally, an affirmative duty to protect individuals will be imposed only where the state has selected a person from the public at large and placed him in a position of peril. *See, e.g., Estelle vs Gamble*, 429 U.S. 97 (1976), (state officials are under a duty to provide medical care to those held in custody of prison officials); *Youngberg vs Romeo*, 457 U.S. 307 (1982) (caretakers of individuals committed to a mental institution have an affirmative duty to provide that level of care and training necessary to protect the safety of the mentally retarded individual); *cf. White vs Rochford*, 592 F.2d 381 (7th Cir. 1979) (where police officers abandoned minors in car on highway after making a traffic arrest of the adult driver, state placed the minors at peril and was subject to liability under § 1983). This is appropriate since, in those situations, the person in custody is dependent upon the state for his physical well-being. In no instance, however, has this Court or any other Circuit Court imposed a duty upon school districts and its officials

to protect students, who are at liberty.

In the instant case, however, there can be no special relationship, as Sowers was not in the "custody" of school officials at the times of the alleged assaults.[8] While the District Court notes that the *in loco parentis* doctrine, adopted by the Commonwealth of Pennsylvania and codified at 24 Pa.C.S.A. § 13-1317, gives school administrators certain authority over students, District Court Opinion, App. at 24, the Court fails to acknowledge that, at the time of the alleged assault in this case, that section was inapplicable because Sowers was not then in attendance at school or going to or from the school.

*F. Petitioners are entitled to qualified immunity*

The holding of the District Court in the case at bar is particularly egregious in that, after finding for the first time that this extensive affirmative constitutional duty to protect students exists, it then declares that the Petitioners are not immune from suit. This it can only do if the constitutional rights which were purportedly violated were "clearly established" at the time Petitioners acted. It is respectfully submitted that constitutional rights which are declared for the first time in 1988 were not clearly established in 1979.

This Court established the current standards govern-

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[8] As noted above, the alleged assault in this case took place during summer vacation, while the student was voluntarily present in the teacher's home.

ing qualified immunity in *Harlow vs Fitzgerald*, 457 U.S. 800 (1982).[9] In *Harlow*, this Court stated:

> Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

*Id.* at 818. As this Court determined in *Davis vs Sherer*, 468 U.S. 183 (1984), no other inquiry is relevant.

From the foregoing formulation, the following analysis must be undertaken to determine whether a claim of qualified immunity is properly taken:

1. Is the claim asserted by governmental officials performing discretionary functions?

2. Does Plaintiff have a clearly established statutory or constitutional right which is threatened by the aforementioned exercise of discretion?

3. Should a reasonable person expect that his conduct in exercise of his discretion would violate that right?

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[9] *Harlow* was a suit against federal, not state, officials, but as this Court stated in deciding the case, it is "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." 457 U.S. at 818, n.30 (quoting *Butz vs Economou*, 438 U.S. 478, 504 (1978).

The first step of the analysis outlined above cannot be seriously disputed. Public school officials are certainly governmental officials, and the actions taken by them with respect to investigation of allegations of teacher misconduct, as well as their responses to the results of that investigation, are highly discretionary in nature. Thus, Smith, Miller and Shuey are entitled to assert the defense.

The second prong of this three part analysis is not met. In the instant case, neither the district nor Petitioners owed Sowers any constitutional duty to protect her from assaults by Wright committed at his house during summer vacation. *See* pp. 11-16, above. This means immunity is properly invoked.

Finally, even if the Court could find that such a constitutional duty exists, these officials are still immune since they satisfy the requirements of the third prong; that is, they could not reasonably be expected in 1979 to have known that a constitutional right to such protection would be announced in 1988.

In *Harlow vs Fitzgerald, supra*, this Court expressly declined to set forth the criteria for determining whether a right (and, Petitioners submit, a corresponding duty) is "clearly established". 457 U.S. at 118, n.32. However, the Third Circuit, in *People of Three Mile Island vs Nuclear Regulatory Commissioners*, 747 F.2d 139, 145 (3rd Cir. 1984), adopted an approach that requires officials to apply general, well-developed legal principles. 747 F.2d at 144. This approach requires some -- but not precise -- factual correspondence between applicable legal precedents and

the case at issue. *Id.* at 145. Officials are therefore required to relate established legal principles set forth in previous cases to analogous factual situations. *Id.* at 144, citing *Williams vs Bennett*, 689 F.2d 1370, 1381-82 (11th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983). It does not, however, require lay public officials to "predic[t] the future course of constitutional law." *People of Three Mile Island*, 747 F.2d at 144, quoting *Pierson vs Ray*, 386 U.S. 547 (1967).

The question becomes, then, one of identifying legal principles governing analogous factual situations at the time the alleged violation occurred, and, if any existed, whether the official should have related this established law to the situation before them. *Hicks vs Feeney*, 770 F.2d 375, 380 (3rd Cir. 1985). Hence, a review of the law as it existed in 1979 must be undertaken.

The District Court relied on a number of cases in determining whether or not clearly established law imposed a constitutional duty upon Petitioners to protect Sowers. District Court Opinion, App., pp. 29-30. But the cases upon which the Court primarily relied involved procedural due process claims under which high school students were entitled to freedom from arbitrary punishment and disciplinary procedures, or cases involving alleged police misconduct.[10] *Ingraham v. Wright*, 430 U.S. 651, 673-74, 97

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[10] The District Court, in finding a substantive due process right to protection from state intrusions into bodily security, cited a number of cases. *See* District Court Opinion, App. at 29-30, n. 8. Most of the cases cited, however, were decided subsequent to 1979, and cannot therefore stand for

S.Ct. 1401, ___, 51 L.Ed.2d 711, 731-732 (1977) involved only a claim of *procedural* due process involving corporal punishment, again far removed from the substantive duty claimed in this case.

The distinction Smith, Miller and Shuey draw between the corporal punishment cases such as *Ingraham* and this case is not merely semantic. Rather, an examination of *Hall vs Tawney*, 621 F.2d 607 (4th Cir. 1980), relied upon by the District Court, *see* its Opinion at App. p. 32, reveals the critical distinction between the case at bar and a case of allegedly improper corporal punishment. In *Hall*,

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the proposition that the constitutional duty claimed in this case was "clearly established" in 1979. The few cases decided prior to 1979 include *Ingraham v. Wright*, 430 U.S. 651, 673-74, 97 S.Ct. 1401, ___, 51 L.Ed.2d 711, 731-732 (1977) (corporal punishment of students by teachers, substantive due process right to personal security); *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952) (forcible use of stomach pump by police); *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979) (police arrest driver of car, abandoning three passenger children); *Johnson v. Glick*, 481 F.2d 1028 (2d Cir.), *cert. denied* 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973) (unprovoked beating of pretrial detainee by guards); and *Jenkins v. Averitt*, 424 F.2d 1228, 1231-32 (4th Cir. 1970) (reckless pistol shooting of suspect by police). All but *Ingraham* involve claims of police misconduct which cannot in any way be likened by these lay administrators to the situation in which they were acting.

The other cases cited by the District Court are equally inapplicable to the proposition that the law was "clearly established" in 1979 that school district administrators had a constitutional duty to investigate whether or not a school teacher was sexually abusing a student. In *Doe vs New York City Department of Social Services*, 649 F.2d 134 (2nd Cir. 1981) and *Doe vs New York City Department of Social Services*, 709 F.2d 782 (2nd Cir. 1983), *cert. denied* 464 U.S. 864 (1983) there is no discussion involving a substantive constitutional right. And, *P.L.C. vs Housing Authority of the County of Warren*, 588 F.Supp. 961 (W.D. Pa. 1984), along with the previous cited authority, was decided subsequent to 1979.

the Fourth Circuit found that recognizing a substantive due process right to be free from "*state intrusions* into realms of personal privacy and bodily security" was appropriate "as a last line of defense against . . . literally outrageous abuses of official power . . ." *Id.* at 613 [emphasis supplied].

In *Hall*, the Court was faced with allegations that a child had been subjected to paddling despite her parents' prior instructions to the school that they did not wish school officials to inflict corporal punishment on their daughter. What was at issue, then, was a *conscious decision* by school officials to inflict corporal punishment on a student. The persons who made that decision were the defendants who were alleged to have abused their "official power" and who actually visited the "intrusion into . . . personal privacy and bodily security . . ."

In the case at bar, however, far from a "literally outrageous abuse of official power," Sowers accuses Smith, Miller and Shuey of not exercising their power sufficiently to prevent harm from being visited upon her from another source. The administrators are not accused of any sexual contact with Sowers; thus they are not the actors who inflicted the actual harm on her.[11] The allegations of her Complaint are thus of an entirely different character than the authority upon which she primarily relies.

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[11] There is no allegation that the sexual contact with Edward Wright was sanctioned, approved or ratified by Smith, Miller and Shuey. Since it was that contact which constitutes the "intrusion," in no way has there been a "state intrusion" as that term is used by the Court in *Hall vs Tawney*.

Indeed, the instant case is a far cry from situations involving a clearly established and well litigated general proposition in which the case at hand merely presents the new factual wrinkle. Petitioners in 1979 had not previously encountered, nor were they aware of any cases, involving situations remotely parallel to the incidents which are the subject of this lawsuit. Whether there existed any constitutional requirement to protect female students from sexual abuse was an open question at all times relevant hereto.

As Justice Stapleton noted in his dissent in *Stoneking v. Bradford Area School District, et al.*, 856 F.2d 594 (3d Cir. 1988), *petition for certiorari pending* at No. 88-802 in this Court,

> Neither this court nor any other federal court of appeals has held, however, that a special relationship exists between a school administrator and students within his or her jurisdiction.
>
> The court's argument for finding a special relationship is quite properly based on analogy. The analogies employed, however, are not sufficiently close to the situation before us to make the court's conclusion "readily apparent" to reasonable school administrators. While school attendance is mandatory, for example, the relationship between a superintendent of a public school district and high school students

within the district is clearly distinguishable from that between a social worker and her five-year old ward or that between a jailer and his incarcerated charge.

*Id.*, App., pp. 26-27.

The holding of the District Court in the instant case has required the public school administrators to "predict the future course of constitutional law", contrary to its own holding in *People of Three Mile Island, supra*, 747 F.2d at 144, quoting *Pierson vs Ray*, 386 U.S. 547 (1967). Indeed, had these public school administrators in this case been able to "predict the future course of constitutional law," they would have concluded that there was in fact *no* constitutional duty to protect students from sexual abuse by teachers.

Before the Court decided the instant appeal, the Pennsylvania Commonwealth Court ruled squarely that no such duty exists. In *Scott vs Willis*, ___ Pa.Commw. ___, 543 A.2d 165 (1988), two students who had been sexually assaulted by a teacher on school property brought suit against the school district and its officials, alleging a violation of their constitutional rights and seeking relief under § 1983. The Pennsylvania Commonwealth Court sustained a demurrer to the § 1983 claim, holding expressly that there was no special relationship between the school district and the plaintiffs, and that therefore there was no constitutional duty to protect those students. *Id.* at 171.

This holding in *Scott vs Willis* is at odds with the

Third Circuit decision and Sowers' claim in the present case. This disparity between the federal and state appellate courts demonstrates that the law regarding the right and corresponding duty that Sowers now claims was owed to her by Petitioners was not clearly established in 1979, and indeed has not been clearly established to the present time. Certainly, if both state and federal appellate courts cannot agree today on whether any constitutional duty exists, the lay public school administrator could not be expected to make any such determination in 1979.[12]

Accordingly, because no clearly established law existed in 1979 upon which Sowers can base her claim, Petitioners are entitled to assert the defense of qualified immunity, and be dismissed as defendants in this case.

***G. The Third Circuit's decision places school districts and their administrators in the position of guarantors of a student's safety, even when the student is not attending school or a school sanctioned activity.***

It is difficult to hypothesize a case less likely to result in liability than this. If a school district is potentially

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[12] It should be noted that the relationship between a Pennsylvania public school and its students is created under state law, and that school administrators are bound by state laws and state courts just as much as by federal laws and federal courts. How can it be said that there clearly established law in 1979 created a special relationship and protective duty between public school administrators and their students, when the state courts, on identical facts, have found in 1988 that no such relationship or duty exists?

liable to a female student who, while on summer vacation, leaves a family social function in an intoxicated condition, and then is assaulted while voluntarily visiting the private home of a teacher, then the school district and its administrators are virtual insurers of the safety of all students, regardless of fault, whenever and wherever they may come in contact with a school district employee.

This result is directly contrary to accepted law. It is well established that a municipal government cannot be held liable under § 1983 on a *respondeat superior* theory; *see Monell vs New York City Department of Social Services*, 436 U.S. 658 at 691 (1978); yet even the theory of *respondeat superior* does not reach as far as the Court's holding in this case. What private employer would be held responsible for the criminal activities of its employee, committed in the employee's own home on his own time, when those activities were not in furtherance of any conceivable work of the employer? None.

This Court cannot permit this pronouncement of the law to stand. Petitioners are entitled to the defense of qualified immunity, and must be dismissed as defendants in this case.

## IX. CONCLUSION

WHEREFORE, Petitioners pray that a Writ of Certiorari issue from this Honorable Court to review the judgment of the United States Court of Appeals for the Third Circuit in this action. In the event that the Petition is granted, Petitioners pray that the judgment of the Court below be reversed, that the cause be remanded, and that the Court below be directed to dismiss Petitioners as defendants, as prayed for in the Petition.

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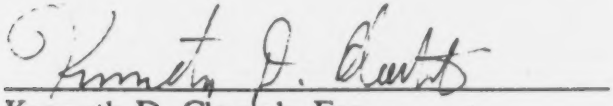
## X. CERTIFICATION OF MEMBERSHIP

It is hereby certified that both Attorneys for the Petitioners are members of the Bar of the Supreme Court of the United States.



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